Nos. 01-653 & 01-657

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,

Respondents.

ARCTIC SLOPE REGIONAL CORPORATION,
COUNCIL TREE COMMUNICATIONS, LLC, AND
VOICESTREAM WIRELESS CORPORATION,

Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

REPLY BRIEF FOR PETITIONERS ARCTIC SLOPE REGIONAL CORPORATION, COUNCIL TREE COMMUNICATIONS, LLC, AND VOICESTREAM WIRELESS CORPORATION

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REPLY BRIEF FOR PETITIONERS ARCTIC SLOPE REGIONAL CORPORATION, *et al.*

Nowhere in the voluminous briefing of NextWave and its amici is there any discussion of the *public* interest in the allocation of the spectrum licenses at issue. Instead, NextWave focuses only on its own interest in reaping a perceived windfall in order to solve its financial woes, all the while seeking to blame the FCC for those problems and its inability yet to provide service to a single customer with the spectrum.

It is not surprising NextWave disregards the public interest. The electromagnetic spectrum is a scarce and valuable *public* resource that no one may use unless the FCC determines that the "public interest, convenience, and necessity will be served." 47 U.S.C. § 309(a). Exercising this statutory responsibility, the FCC determined that NextWave's contin-

ued hold on exclusive licenses is *not* in the public interest, and NextWave does not challenge that determination. Contrary to NextWave's arguments, however, Section 525 of the Bankruptcy Code does not override this regulatory determination. Consistent with other provisions of the Code that enable government agencies to fulfill their duties to protect the public, Section 525 prohibits license cancellation only where the action is taken "solely" for certain pecuniary réasons and not where, as here, the action furthers valid regulatory concerns. Neither NextWave nor its creditors had any valid expectation that NextWave would be able to keep its licenses without meeting its regulatory obligations, and thereby tie up a scarce public resource that the FCC has determined should be available to others.

I. THE CANCELLATION OF NEXTWAVE'S LICENSES DID NOT VIOLATE SECTION 525.

A. NextWave's Licenses Were Not Canceled "Solely Because" of Prohibited Pecuniary Motives.

NextWave's constant refrain that petitioners seek a "regulatory exception" to Section 525 is a red herring. *See, e.g.*, Br. 16, 19, 25, 34, 40. We seek only to enforce the statute as written. Section 525 provides that a government agency may not cancel a license "solely because" a debtor has failed to pay a debt dischargeable in its bankruptcy case. Thus, by its plain terms, the statute does not prevent an agency from canceling a license for additional reasons *other* than the mere fact that a debtor has failed to pay a dischargeable debt. NextWave ignores the significance of Congress's use of the words "solely because," which are fatal to its case.

NextWave does not dispute that the FCC had a valid regulatory reason for canceling its licenses—its determination that NextWave "was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." Pet. App. 234a (Second Circuit opinion); *see id.* at 79a-83a. Instead, NextWave argues that

the FCC's regulatory reason is "irrelevant" under Section 525 because the statute "says nothing about the underlying purpose or motive" of the government agency. Br. 2, 25-26. But the statute most surely does. In prohibiting cancellation of a license solely "because" of one of the factors enumerated therein, Section 525—like other anti-discrimination provisions—plainly speaks in terms of reasons or motives.[1] Given that the FCC had an indisputably valid regulatory reason for canceling NextWave's licenses—the protection of the public interest—the cancellation did not violate Section 525.

A brief filed by a lobbying group and a handful of Congressmen relies on Title VII cases to argue that Section 525 addresses only "causation" and has nothing to do with "motive." Br. for Sen. Leahy *et al.* 23-24. *See also* NextWave Br. 25 (arguing that Section 525 is violated whenever "the sole cause for [cancellation] is one of three specified triggers"). Not so. As even these amici note, Br. 24 n.8, under Title VII an action taken "because of" both a proscribed reason and another one is called the "mixed *motives*" situation. In fact, the analogy to Title VII supports our point, not NextWave's. Title VII bars any action taken "because of" an invidious ground such as race, 42 U.S.C. § 2000e-2(a)(1), and thus reaches any situation where such a ground is even one of many motivating factors. Section 525, by contrast, reaches only actions taken "*solely* because" of a prohibited reason. The distinction is highly significant, particularly given the differences between the invidious discrimination

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[1] *See Wisconsin* v. *Mitchell*, 508 U.S. 476, 482, 487 (1993) ("motive" played same role under statute that "punish[ed] the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection" as it does under anti-discrimination laws) (quotation omitted; emphases in original); *Terry* v. *Reno*, 101 F.3d 1412, 1420 (D.C. Cir. 1996) (statute's prohibition of conduct "because" of certain events is its "motive requirement"), *cert. denied*, 520 U.S. 1264 (1997); *see also* Arctic Slope Br. 26.

prohibited by Title VII and the financial considerations addressed by Section 525: "the words 'because of' do not mean '*solely* because of.'" *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989) (plurality; emphasis in original). Here, the statute says "solely because."

Contrary to NextWave's argument (Br. 25-26), allowing the FCC to cancel its licenses for a valid regulatory purpose would not render the exceptions contained in Section 525 superfluous. These exceptions allow the Secretary of Agriculture, as expressly provided by statute, to exclude persons from participation in certain agricultural commodities markets *solely* because such persons have been discharged as bankrupts, regardless of whether the cancellation could also be shown to serve valid regulatory objectives.[2] Unlike these exempted situations, the FCC did not cancel NextWave's licenses based solely on the fact that NextWave had declared bankruptcy, but rather did so because NextWave's failure to make good on its bid signified that it was not the applicant most likely to promote Congress's regulatory objectives.

Nor is it true that an agency can "always articulate *some* regulatory motive" for canceling a license and thereby escape Section 525's prohibitions. NextWave Br. 26. Although agencies may often have valid regulatory reasons for canceling a license when the licensee becomes insolvent, that just shows the relatively narrow scope of Section 525's "solely because" prohibition. As we have noted, however, there are many situations where the cancellation of a license for failure to pay a debt will not necessarily serve valid regulatory

[2] *See* 7 U.S.C. § 204 (authorizing automatic termination of trading license upon insolvency); *id.* § 499d(a) ("the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt"); *id.* § 499d(e) (authorizing automatic denial of license to anyone who "has, within three years prior to the date of the application, been adjudicated or discharged as a bankrupt").

purposes, as opposed to just the pecuniary interests of the government or a private party. *See* Arctic Slope Br. 27. And as shown in the related context of the regulatory exception to the automatic stay, courts are quite capable of distinguishing between the two situations. *Id.* at 27-28. As the automatic stay cases demonstrate, just because an agency says it is acting for non-pecuniary reasons does not make it so. Here, however, the validity of the FCC's non-pecuniary regulatory concerns is *undisputed*.[3]

That was not so in *Perez* v. *Campbell*, 402 U.S. 637 (1971), which Section 525 was intended to codify. *See* H.R. Rep. No. 95-595 ("House Report"), at 165, 366-367 (1978); S. Rep. No. 95-989 ("Senate Report"), at 81 (1978). Important to the Court's decision was its conclusion that the "sole emphasis" of the statute at issue was "providing leverage for the collection of damages." 402 U.S. at 646.[4] Such pecuni-

[3] The attempts by NextWave to paint the FCC as concerned only about making money for the Treasury, *see, e.g.*, NextWave Br. 1-2, 10, 37, 50, are thus immaterial because NextWave does not dispute the validity of the FCC's regulatory concerns. Indeed, although the FCC is statutorily prohibited from basing licensing decisions solely or predominantly on the expectation of Federal revenues, 47 U.S.C. § 309(j)(7)(B), NextWave has not challenged the FCC's action on this ground. But in any event, the FCC promptly sought to enforce its cancellation rule upon the Second Circuit's reversal of the bankruptcy court's erroneous ruling that NextWave could keep its licenses for a mere fraction of its bid.

[4] Contrary to NextWave's contention, Br. 28-29, the Arizona statute at issue in *Perez* discriminated against debtors by specifically providing that "[a] discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the [statute's] requirements." 402 U.S. at 642 (quotation omitted). By contrast, the FCC's rules apply evenhandedly to all persons who fail to abide by them and in no way discriminate against debtors. Although NextWave argues that "[t]o 'discriminate' is but one of nine separate and independently operative prohibitions listed in § 525(a)," Br. 28, Congress in fact viewed all

ary debt collection motives are plainly not the "sole emphasis" of the FCC's actions. Rather, the FCC has shown no interest in collecting NextWave's debt, focusing instead on its regulatory goal of getting the licenses into the hands of companies able to further statutorily-mandated objectives.[5]

The FCC's action thus was not an impermissible "automatic reaction" to NextWave's bankruptcy. NextWave Br. 27 (quoting House Report at 165). The cited legislative history, like the statute, evinces an intent to prevent agencies from "automatically deny[ing] certain licenses to an individual *solely* on the basis of a bankruptcy." House Report at 165 (emphasis added). But it also makes clear that Congress intended to leave government entities free "to pursue appropriate regulatory policies and take appropriate actions." *Id.*; *see also* 123 Cong. Rec. 35,673 (1977) ("it was never the intention of the Judiciary Committee to interfere with legitimate regulatory objectives") (Rep. Butler). Indeed, "an examination into the circumstances surrounding the bankruptcy" is particularly appropriate where, as here, "the causes of a bankruptcy are intimately connected with the license." House Report at 165.

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such actions as "various forms of discrimination against former bankrupts." House Report at 367; Senate Report at 81.

[5] We do not seek to "resurrect" the approach of cases criticized in *Perez*. *See* NextWave Br. 27 (citing *Kesler* v. *Department of Public Safety*, 369 U.S. 153 (1962), and *Reitz* v. *Mealey*, 314 U.S. 33 (1941)). The *Perez* Court distinguished those cases because the "declared purpose" of the Arizona law, unlike those in *Kesler* and *Reitz*, was the collection of discharged debts. 402 U.S. at 654. No such purpose (or effect) is present here. Nor do we argue that a governmental entity can avoid Section 525 simply by declaring a regulatory purpose other than debt collection—the other ground upon which *Perez* criticized the earlier cases. *Id.* at 651-652. As noted, under Section 525 a court must ascertain that a governmental action serves valid regulatory goals where that issue is joined.

The FCC's decision to enforce its cancellation rule in this case was not an automatic reaction based "solely" on NextWave's bankruptcy, but rather was predicated on valid, non-pecuniary regulatory policies formulated after thorough deliberations. When NextWave and other C-Block licensees encountered financial difficulties, the FCC conducted lengthy proceedings to determine whether to relieve them of their payment obligations. After temporarily suspending those obligations—and thus preventing licenses from automatically canceling—the FCC offered restructuring options that allowed licensees to surrender some or all of their licenses for full or partial forgiveness of their debt. *See* Arctic Slope Br. 11 n.1. Many troubled licensees availed themselves of these options. Upon careful consideration, however, the FCC declined to allow licensees to keep all their licenses for less than their bids, because to do so would "gravely undermine the credibility and integrity" of the auction process. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order & Further Notice of Rulemaking*, 12 F.C.C.R. 16436, ¶ 19 (1997).

Even so, the FCC still has the discretion to waive any rule in any particular case, upon a showing that "[t]he underlying purpose of the rule(s) would not be served," and that "a grant of the requested waiver would be in the public interest." 47 C.F.R. § 1.925(b)(3)(i). *See In re Lakeland PCS LLC, Second Order on Reconsideration*, 15 F.C.C.R. 23733 (WTB 2000) (finding constructive waiver of timely payment rule). Requests to waive the cancellation rule at issue here, timely filed by licensees *prior* to default, are pending. *See, e.g.*, Airadigm Br. 4. One of these licensees now argues strenuously that the FCC ought to exercise its discretion to waive its on-time payment rule in various circumstances. *Id.* at 4, 28-29. But whatever the merits of this argument, it is for the FCC, not a bankruptcy judge, to resolve.

Unlike these other licensees, though, NextWave has *never* sought a waiver of the FCC's rule. Instead, it tried to exempt itself through bankruptcy. It first convinced a bankruptcy judge to reduce its winning auction bid by nearly 80%. Then, when that strategy failed and another one better suited its financial interests, it belatedly stated it would pay full price. Yet notwithstanding all these attempts to circumvent FCC regulations, the agency still entertained NextWave's request for a retroactive exemption from the cancellation rule. After carefully considering all the circumstances, the FCC denied the request, ruling that the *public* interest outweighed NextWave's private financial interests. Pet. App. 80a.

In sum, Section 525 does not prohibit the cancellation of a license where the sole "trigger" is the failure to pay a dischargeable debt. It prohibits cancellation "solely because" a debtor has failed to pay a dischargeable debt. If an agency has other legitimate reasons for cancellation, Section 525 is not violated simply because the agency would not have cancelled the license "but for" the debtor's failure to pay. Here, it is undisputed that the FCC had such valid regulatory concerns, and Section 525 thus does not apply.[6]

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[6] NextWave's reliance on unenacted legislative proposals is unavailing. *See* Br. 19 n.12; *see also* Creditor Br. 8-9; Br. for Sen. Leahy *et al.* 14-15. As this Court has oft repeated, "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute," because "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook Cty.* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 169-170 (2001) (quotations omitted). That is especially true here, where the proposed legislation would have exempted the FCC from the *entire* Bankruptcy Code, not just Section 525. *See* 145 Cong. Rec. S14104 (daily ed. Nov. 5, 1999); NextWave Br. 19 n.12. Moreover, whatever the current opinions of a handful of members of Congress, such "postenactment views form a hazardous basis for inferring the intent behind a statute." *United States* v. *Monsanto*, 491 U.S. 600, 610 (1989) (quotation omitted).

B. NextWave's Licenses Were Not Canceled Solely Because Of Its Failure to Pay a "Debt That is Dischargeable in the Case Under This Title."

1. As we have shown (Arctic Slope Br. 28-33), the FCC did not violate Section 525 for an additional, related reason. NextWave's payment obligations were express regulatory conditions on its right to hold its licenses. As such, they are not debts that are dischargeable "in the case under this title," 11 U.S.C. § 525(a), because bankruptcy courts have no authority to review, much less modify, FCC regulations and because *no* court has the authority to grant a party a license contrary to a legitimate FCC regulatory determination that such a grant would not serve the public interest.

Without seriously disputing these propositions, NextWave argues (Br. 33) that it is entitled to retain its licenses without *ever* paying for them because its debt might eventually be discharged in bankruptcy. But NextWave fails to explain how a bankruptcy court could excuse payment in this manner without impermissibly treading on the regulatory authority of the FCC. As the Second Circuit correctly held, the bankruptcy court could not. Thus, the regulatory payment condition that prompted the cancellation was clearly not a "debt that is dischargeable" in NextWave's bankruptcy case, and the cancellation did not violate Section 525.

Rather than explain how a bankruptcy court's modification of an FCC regulatory condition can be reconciled with the FCC's exclusive licensing authority, NextWave contends that this Court's decisions in *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 495 U.S. 552 (1990), and *Ohio* v. *Kovacs*, 469 U.S. 274 (1985), foreclose petitioners' argument. *See* Br. 21. Those cases, however, considered only whether certain obligations were "debts" under the Code, not whether express regulatory conditions were "dischargeable" in a bankruptcy case. Indeed, in *Kovacs*, this Court took pains to emphasize that its decision was not intended to

prevent government entities from enforcing truly *regulatory* requirements that protect the public. *See id.* at 284-285 ("[W]e do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State's waters is dischargeable in bankruptcy * * *.").[7]

2. Moreover, and in any event, NextWave does not even attempt to refute our alternative submission that its debt is not dischargeable within the meaning of Section 525 because (1) the relationship between NextWave and the FCC—to the extent considered an ordinary commercial arrangement—was executory in nature and (2) executory obligations, regardless of whether assumed or rejected, are not dischargeable debts. *See* Arctic Slope Br. 30-31. NextWave's failure to respond underscores the correctness of the argument, the premises of which NextWave has previously conceded.[8]

Neither NextWave nor its amici refute the proposition that the commercial relationship between NextWave and the FCC, like the relationship between any licensor and licensee,

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[7] *See also id.* at 283 n.11 (distinguishing case holding that injunction to comply with environmental laws was exempt from automatic stay because that case involved "an effort to enforce the police power statutes of the State, not a suit to enforce a money judgment"); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 502 (1986) (relying on *Kovacs* to hold that Bankruptcy Code does not permit trustee to abandon contaminated land in contravention of regulatory clean-up order).

[8] NextWave wrongly asserts (Br. 35 n.23) that this point has been waived. It is raised in support of the broader argument that NextWave's payment obligations were not dischargeable within the meaning of Section 525—an issue both presented and passed on below. *See* Pet. App. 41a-44a. Once an issue is properly presented, a party can make any argument in support of its position. *See Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 245-246 n.2 (2000) ("[P]arties are not limited to the precise arguments they made below.") (quotation omitted).

is executory in nature. *See* Arctic Slope Br. 30.[9] Under Section 365 of the Code, 11 U.S.C. § 365, a debtor must either "assume" or "reject" an executory contract. As NextWave has noted, if the debtor is permitted to assume the contract, the resulting obligation is a *post*-petition debt and thus not "dischargeable" in bankruptcy. *See* Pet. Opp. 17-18 & n.8. Likewise, if the debtor rejects the contract—as NextWave would be required to do here, *see* Arctic Slope Br. 31 n.8—the other party (here, the FCC) is *released* from performance and has a claim, not for the underlying debt itself, but for damages. *See* Pet. Opp. 18. Contrary to NextWave's attempt to disavow its own words, *see* NextWave Br. 36 n.23, it has clearly stated that "[t]he sums owed on account of a post-assumption default * * * would not be dischargeable," and that if an executory license were rejected "the FCC would have no obligation to perform its side of the contract by granting the licenses * * *." Pet. Opp. 18 & n.8.

Thus, whether the debtor assumes or rejects an executory contract, the underlying debt is nondischargeable. Although the Court need not reach this argument given the other reasons why Section 525 does not apply, even under NextWave's *own* view of the law the FCC's cancellation of NextWave's licenses would not violate the statute.[10]

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[9] Contrary to NextWave's misreading of our opening brief, NextWave Br. 35 n.23, we expressly argued that NextWave's license obligations, to the extent commercial in nature, are executory. *See* Arctic Slope Br. 30 ("the relationship between NextWave and the FCC is plainly executory").

[10] NextWave erroneously contends that considering this argument would require the Court to address circuit splits. Br. 36 n.23. NextWave cites *no* case holding that payment obligations under executory contracts are dischargeable debts either generally or under Section 525. *See id.* (citing *In re Stewart Foods, Inc.*, 64 F.3d 141, 144, 145 n.2 (4th Cir. 1995) (noting that damages from the rejection of an executory contract "are treated as a pre-petition claim," and that "[w]hen a debtor-in-possession assumes an execu-

II. THE DECISION BELOW IS INCONSISTENT WITH THE STRUCTURE OF THE BANKRUPTCY CODE.

NextWave's constant refrain is that the FCC is acting as an ordinary creditor when it seeks to reallocate NextWave's spectrum licenses in the public interest, and that Section 525 must be interpreted according to the general purpose of the Code, which NextWave says is to allow NextWave "breathing space" from such actions. *See, e.g.*, NextWave Br. 34, 36. NextWave's creditors likewise argue that they necessarily relied on this understanding in lending to and investing in NextWave. *See* Creditor Br. 4.

In fact, the Code specifically recognizes that a government agency acting pursuant to its regulatory powers is not just like an ordinary creditor, and that debtors are *not* entitled to any "breathing space" from such actions. The Code exempts from the automatic stay any action by a government entity to enforce its "regulatory power." 11 U.S.C. § 362(b)(4). As the Second Circuit held, the FCC's cancellation of NextWave's licenses falls within that exemption because the FCC was "[u]ndoubtedly * * * a governmental unit that is seeking 'to enforce' its 'regulatory power.'" Pet. App. 125a.[11] And even under NextWave's *own* interpretation of

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tory contract, the contract becomes a post-petition arrangement")). And while the plain language of Section 365(c)(1)(a) requires that NextWave must reject its executory licenses because applicable law bars their assignment, *see Perlman* v. *Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747 (9th Cir. 1999); *City of Jamestown* v. *James Cable Partners (In re James Cable Partners)*, 27 F.3d 534, 537 (11th Cir. 1994); *In re West Elecs. Inc.*, 852 F.2d 79, 83 (3d Cir. 1988), that issue need not be resolved here because, as noted, Section 525 is not violated *regardless* of whether NextWave were to assume or reject its licenses.

[11] NextWave half-heartedly attempts to dispute that holding on the ground that the regulatory exception does not apply to the enforcement of liens. *See* Br. 38-39; 11 U.S.C. § 362(a)(5). The

Section 525, the FCC could automatically cancel its licenses for violation of a multitude of regulatory requirements. *See* NextWave Br. 49-50 ("Section 525 says nothing about license conditions that are unrelated to financial obligations or the declaration of bankruptcy" such as construction deadlines); Creditor Br. 28; Br. for Sen. Leahy *et al.* 28-29. Thus, it is simply not true that Section 525 was intended to "preserve" licenses for the bankruptcy estate under all circumstances. NextWave Br. 36.

This fact disposes of the argument of NextWave's creditors that they somehow relied on NextWave's ability to keep its licenses in bankruptcy, and that "no rational creditor" would ever lend money to a licensee under petitioners' interpretation of Section 525. Creditor Br. 4-5. *See also id.* at 25-26. Even under the interpretation advanced by NextWave and its allies, any person would know that licenses could be revoked in bankruptcy for a variety of regulatory reasons, *regardless* of the effect such cancellation would have on NextWave's creditors or its reorganization prospects.[12] It is likewise

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attempt fails. The regulatory exception expressly applies to "any act to obtain possession of property of the estate * * * or to exercise control over property of the estate." *Id.* § 362(a)(3). *See id.* § 362(b)(4) (exception applies to actions "under paragraph (1), (2), (3), or (6) of subsection (a)"). That the FCC chose, out of an abundance of caution, to take a security interest in the licenses cannot "un-exempt" its expressly exempted cancellation, particularly given that the FCC has not instituted any action to foreclose on that interest. *See also* Arctic Slope Br. 34 n.10.

[12] Given the FCC's fully secured status, NextWave's creditors would benefit from the application of Section 525 only if the value of the licenses exceeded NextWave's debt to the FCC after NextWave declared bankruptcy, thereby allowing NextWave to reap a windfall from its alleged insolvency. If, as the creditors now say, they relied on this speculative chain of events in lending or investing money, that is all the more reason to preclude NextWave from gaming the licensing system in this manner.

absurd to suggest that Section 525 had a "well-developed meaning" prohibiting the FCC from enforcing regulatory policies that involve payment conditions, Creditor Br. 17, given that the D.C. Circuit's statutory interpretation was contrary to that of other circuits. *See* Arctic Slope Pet. 17-20. If there was anything NextWave and its creditors should have relied on, it was the FCC's regulations and the licenses themselves, which expressly warned that the licenses would automatically cancel upon failure to make timely payment. *See* 47 C.F.R. § 1.2110(e)(4)(iii) (1997); Pet. App. 388a.

NextWave thus espouses an interpretation of Section 525 at odds with the basic structure of the Code. Like any statute, the Code must be read "as a symmetrical and coherent regulatory scheme." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995). In the regulatory exception to the automatic stay, Congress provided that a bankruptcy filing should not hinder governments' abilities to effectuate valid regulatory purposes—as opposed to purely pecuniary ones. That was also its expressed intent in enacting the narrow "solely because" prohibition of Section 525. *See supra* at 6. We advance an interpretation in harmony with that intent and structure—one that interprets the narrow prohibition of Section 525 consistently with the corresponding exception to the automatic stay. NextWave, by contrast, advances an inconsistent interpretation that would prevent the FCC from enforcing what is now perhaps the most important indicator of the public interest in spectrum allocation: a licensee's ability and willingness to timely pay what it has bid.

Contrary to NextWave's argument by analogy, Br. 38 & n.24, nothing in *Davenport* or *Kovacs* indicates that Section 525 should be interpreted inconsistently with the regulatory exception to the automatic stay. As noted, those cases addressed whether certain payment obligations were "debts" subject to ordinary bankruptcy rules—not whether a government entity could pursue regulatory actions against a debtor during bankruptcy. The Court noted that discharging those

monetary obligations would not be inconsistent with exceptions to the automatic stay, *see Davenport*, 495 U.S. at 560-561, but at the same time made clear that government entities can take appropriate *regulatory* action during bankruptcy. *See id.* at 561; *supra* at 9-10 & n.7. Unlike the agencies in those cases, the FCC has not sought to collect NextWave's debt, but rather is seeking only to pursue its regulatory responsibilities to allocate spectrum so as to serve the public interest and Congress's objectives.

III. THE DECISION BELOW IS INCONSISTENT WITH THE COMMUNICATIONS ACT AND DISSERVES THE PUBLIC INTEREST.

The D.C. Circuit's holding that the Bankruptcy Code forces the FCC to leave licenses in the hands of an entity the agency has determined is not serving the public interest simply cannot be reconciled with Congress's clear intent expressed in the Communications Act that the *FCC*—not individual licensees or bankruptcy courts—have the exclusive authority to allocate licenses in the public interest. *See* Arctic Slope Br. 39-40. NextWave's response—that the D.C. Circuit, not a bankruptcy court, invalidated the FCC's cancellation of its licenses—misses the point. Applying the Bankruptcy *Code*—as bankruptcy courts were specially created to do—so as to prevent the FCC from canceling the licenses of an entity that the agency has determined is not serving the public interest impermissibly interferes with its exclusive regulatory authority. The FCC's exercise of that authority remains subject to review for abuse of discretion by the D.C. Circuit. But the D.C. Circuit, no more than a bankruptcy court, may not apply the Bankruptcy Code so as to usurp the FCC's role as the exclusive arbiter of the public interest in allocating licenses to the Nation's radio spectrum. *See, e.g.*, *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946) ("it is the Commission, not the courts, which must be satisfied that the public interest will be served").

The D.C. Circuit's interpretation of Section 525 also threatens the integrity of the auction process. As the Second Circuit explained, the auction mechanism can achieve "fair and efficient allocation of spectrum licenses * * * only if the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue." Pet. App. 246a. Attempting to sidestep the issue, NextWave argues that "Congress rejected a policy of allocating licenses based only on 'willingness and ability to pay the most for the license,' " Br. 45, because Congress also authorized small business preferences. But the fact that Congress also sought to advantage small businesses who could make good on their bids does not alter its overarching intent—as discerned by the FCC—to award licenses to "those bidders with the highest willingness to pay." *In re Implementation of Section 309(j) of the Communications Act, Second Report & Order*, 9 F.C.C.R. 2348 ¶ 71 (1994). Indeed, it is perverse for NextWave to argue that its interpretation of Section 525 furthers the goal of small business preferences, *see* NextWave Br. 46, when that interpretation directly caused the FCC to suspend the installment payment program that NextWave says is critical for small business participation. *See* Arctic Slope Br. 42 n.14. And in any event, NextWave does not dispute that even under a cash-up-front regime, its interpretation would require the FCC to *grant* a license to a company that declares bankruptcy after an auction but before payment is due. *See id.* at 42-43.

NextWave nevertheless maintains that retaining its licenses in bankruptcy without paying for them is compatible with Congress's objective to permit small business participation because it "ensur[es] that small businesses without ready capital can obtain breathing room to reorganize." Br. 46. But the ultimate goal of the auction system is to award licenses to those firms that will actually bring needed technologies and services to the public. A bidder's default indicates that it did not submit a realistic bid and was never "the applicant most

likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." Pet. App. 234a.

Allowing an entity that is providing no service to shield licenses in bankruptcy while it seeks to obtain necessary financing it should have had beforehand impedes Congress's goals of promoting "the development and rapid deployment of new technologies, products, and services * * * *without administrative or judicial delays*," and the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(A), (D) (emphasis added). In this case alone, spectrum worth billions has lain fallow for more than five years, while critical shortages of spectrum abound. The ultimate loser, of course, is the public. The pattern advocated by NextWave—where a winning bidder uses bankruptcy to gain "breathing room" to acquire the necessary financing to pay for its licenses—imposes precisely the "judicial delays" (here already lasting years) that Congress sought to avoid. *Id.*

NextWave fails to dispel the specter of gamesmanship and insincere bidding raised by the D.C. Circuit's decision. Preventing the FCC from enforcing its full and timely payment requirement allows applicants to outbid others who submit realistic bids and in fact value the licenses more highly, and then seek to have their payment obligations adjusted in bankruptcy or buy time there speculating that the value of the licenses will increase. NextWave says that firms "would never finance a business whose strategy was * * * to bid aggressively and rely on the Bankruptcy Code to save it from the consequences of insolvency." NextWave Br. 47-48. But its own creditors seem to disagree, as they argue (albeit incorrectly) that they would not have provided any financing unless NextWave could use Section 525 to earn a windfall in the event of bankruptcy. *See supra* at 13-14 & n.12.

NextWave argues (Br. 49-50) that the FCC may base its licensing decisions on any number of regulatory factors *except* the one perhaps most critical to serving the public

interest—a licensee's ability to make good on the amount it represented it could pay. If left to stand, the D.C. Circuit's decision threatens not only to continue to impair the FCC's ability to award licenses in the manner Congress prescribed, but also to prevent hundreds of other federal, state, and local agencies from carrying out important regulatory objectives. *See* Arctic Slope Br. 44. As explained, the statute does not hamstring agencies seeking to carry out valid regulatory policies necessary to protect the public interest. Indeed, the recent spate of major bankruptcies in the telecommunications industry underscores the need for the FCC to be able to ensure continued service and otherwise protect the public. Thus, this Court should reverse the judgment below to ensure that government agencies remain free "to pursue appropriate regulatory policies and take appropriate actions," just as Congress intended. House Report at 165.

IV. THE COURT NEED NOT REACH NEXTWAVE'S ERRONEOUS "RIGHT TO CURE" ARGUMENT.

NextWave argues in the alternative that the FCC is prevented from canceling its licenses under the Code's provisions addressing the curing of defaults. *See* Br. 40. This Court, however, "generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996). *Accord NCAA* v. *Smith*, 525 U.S. 459, 470 (1999). There is no reason to depart from that settled practice here.[13]

But NextWave is mistaken in any event. NextWave argues that even if both Section 525 and the automatic stay permit cancellation of its licenses, the FCC's actions violate NextWave's purported "right" to cure defaults under 11 U.S.C. §§ 1123 and 1124. The argument makes no sense. If

[13] This is plainly an alternative argument to the Section 525 grounds relied upon by the D.C. Circuit, and not just a different theory in support of an argument reached below. *Cf. supra* n.8

neither the automatic stay nor Section 525 prevent the FCC, after NextWave declared bankruptcy, from immediately canceling and reauctioning NextWave's licenses upon its failure to meet its licensing conditions, NextWave cannot have an overarching "right to cure" that would allow it to reacquire the licenses upon plan confirmation. For all the reasons set forth above, the FCC is entitled to enforce its regulatory authority. As such, only the FCC—and not NextWave or a bankruptcy court—is entitled to decide whether NextWave can "cure" its regulatory violation.

The Code provisions cited by NextWave do not restrict the FCC's regulatory authority. Section 1123 provides only that curing defaults is one of several possible means of implementing a bankruptcy plan. *See* 11 U.S.C. § 1123(a)(5)(G) (plan shall "provide adequate means" for its implementation "such as" curing defaults). Thus, it governs the conduct of those proposing plans, not creditors generally or regulators specifically. Similarly, Section 1124 is a basis for determining whether a party is "impaired" under a plan; it does not restrain conduct or confer any rights.[14] Because these cure provisions do not impose duties on third parties, courts uniformly recognize that intervening events may cut off a debtor's ability to cure defaults. *See, e.g., Midlantic Nat'l Bank* v. *DeSeno (In re DeSeno)*, 17 F.3d 642, 644 (3d Cir. 1994) (no right to cure after foreclosure); *In re Crime Free Inc.*, 196 B.R. 116, 117 (Bankr. E.D. Ark. 1996) (same).

The Commission's cancellation and reauction of the spectrum licenses is just such an event. NextWave's default had

[14] *See id.* § 1124(2)(A) ("a class of claims or interests is impaired under a plan" unless, *inter alia*, the plan cures defaults); *see In re Chateaugay Corp.*, 155 B.R. 625, 634 (Bankr. S.D.N.Y. 1993) ("Section 1124 is not a section that provides a right to cure. It merely provides a method to analyze whether an already formed class may be considered unimpaired under a plan of reorganization."), *aff'd*, 89 F.3d 942 (2d Cir. 1996).

more than just financial consequences; it demonstrated that NextWave's exclusive hold on the public airwaves would not serve the public interest. This harm to the public interest cannot be "cured" by a delinquent payment years after the fact. Rather, the FCC must have the authority to reassert control over the spectrum in order to get it into the hands of others who will abide by its regulations.[15]

CONCLUSION

For the foregoing reasons, and those in petitioners' opening brief, the judgment below should be reversed.

Respectfully submitted,

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[15] Finally, to the extent the licenses can be considered contracts, they are executory in nature, and NextWave would be required to reject them. *See supra* at 11 & n.10. This renders impossible any "cure" that would restore the licenses to NextWave.